

Supreme Court, U.S.
FILED

05-549 OCT 28 2005

No. 05-

~~OFFICE OF THE CLERK~~

IN THE
Supreme Court of the United States

THE EUROPEAN COMMUNITY, *et al.*,

Petitioners,

v.

RJR NABISCO, INC., *et al.*,

Respondents.

DEPARTMENTS OF THE REPUBLIC OF COLOMBIA,

Petitioners,

v.

PHILIP MORRIS COMPANIES, INC., *et al.*,

Respondents.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

PETITION FOR A WRIT OF CERTIORARI

JOHN J. HALLORAN, JR.

Counsel of Record

JOHN F. SCHUTTY III

SPEISER, KRAUSE, NOLAN

& GRANITO

Two Grand Central Tower

140 East 45th Street

New York, NY 10017

(212) 661-0011

Of Counsel:

KEVIN A. MALONE

CARLOS A. ACEVEDO

KRUPNICK CAMPBELL MALONE

BUSER SLAMA HANCOCK

LIBERMAN & MCKEE

Attorneys for Petitioners

QUESTIONS PRESENTED

In *European Community v. R.J.R. Nabisco, Inc.*, 125 S. Ct. 1968 (2005), this Court vacated the judgment of the Second Circuit, which had applied a broad version of the “revenue rule” to bar “smuggling” claims. This Court remanded the case to the Second Circuit for reconsideration in light of *Pasquantino v. United States*, 125 S. Ct. 1766 (2005), which recognized that modern courts have applied the revenue rule in “traditional” circumstances, specifically where the claim seeks to collect an unpaid foreign tax debt from a tax debtor. On remand, the Second Circuit “reinstated” its prior decision, effectively following the *dissenting* opinion in *Pasquantino*.

The questions presented are:

1. Whether the Second Circuit, on remand, failed to comply with this Court’s mandate, *Pasquantino v. United States*, 125 S. Ct. 1766 (2005), and settled law by applying its broad version of the “revenue rule” to bar claims under U.S. domestic law to enjoin and deter domestic tortious conduct.
2. Whether the Second Circuit correctly held, in conflict with the decisions of this Court, the Fourth and Eleventh Circuits, and the Restatement (Third) of Foreign Relations Law § 483 (1987), that the revenue rule is a mandatory doctrine akin to a jurisdictional bar, and not a discretionary abstention doctrine.

PARTIES TO THE PROCEEDING

The Petitioners in the case of the European Community ("EC") and Member States are the EC, Kingdom of Belgium, Republic of Finland, French Republic, Hellenic Republic, Federal Republic of Germany, Italian Republic, Grand Duchy of Luxembourg, Kingdom of the Netherlands, Portuguese Republic, and Kingdom of Spain. The action was originally brought against RJR Nabisco, Inc., R.J. Reynolds Tobacco Company, R.J. Reynolds Tobacco International, Inc., RJR Acquisition Corp. (formerly known as Nabisco Group Holdings Corp.), and R.J. Reynolds Tobacco Holdings, Inc.¹ In the Second Circuit, on the original appeal, the World Health Organization, the Federal Law Enforcement Officers Association, and the National Campaign for Tobacco Free Kids all appeared as *amici* supporting the principle that foreign governments should be permitted to avail themselves of the U.S. courts in this case.

The Petitioners in the case of the Departments of the Republic of Colombia are the Departments of Amazonas, Antioquia, Atlantico, Bolivar, Boyaca, Caqueta, Casanare, Cesar, Choco, Cordoba, Cundinamarca, Huila, La Guajira, Magdalena, Meta, Narino, Norte de Santander, Putamayo, Quindio, Risaralda, Santander, Sucre, Tolima, Valle del Cauca, and Vaupes, and Santa Fe de Bogota, D.C. The case was brought against British American Tobacco (Investments) Limited, BAT

1. Philip Morris International, Inc., Philip Morris Companies, Inc., Philip Morris Incorporated (doing business as Philip Morris Products, Inc.), and Philip Morris Duty Free, Inc. were parties to the action on the original petition to this Court; however, on motion of the EC and the Member States in the Court of Appeals, the Philip Morris entities were dismissed as parties to the EC case. See App. 6a n.5.

Industries plc, Brown & Williamson Tobacco Corporation, BATUS Tobacco Services, Inc., and British American Tobacco (South America) Ltd.; and Philip Morris Companies, Inc., Philip Morris Incorporated d/b/a Philip Morris USA, Philip Morris International, Inc., Philip Morris Products, Inc., Philip Morris Latin America Sales Corporation, and Philip Morris Duty Free, Inc.²

CORPORATE DISCLOSURE STATEMENT

The Member States are sovereign states. The EC is a governmental body created as a result of collaboration among the majority of the nations of Western Europe, presently, Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, The Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. The EC possesses the most extensive legal capacity accorded to legal persons under the laws of the Member States, and it may, in particular, be a party to legal proceedings. In such instances, the EC is represented by the European Commission.

The Departments of the Republic of Colombia and Santa Fe de Bogota, D.C., are political subdivisions of a sovereign state.

-
2. The EC and Member States commenced a separate action against Japan Tobacco, Inc., JT International Manufacturing America, Inc., JTI Duty Free USA, Inc., JT International S.A., Japan Tobacco International U.S.A. and Premier Brands, Ltd. The District Court dismissed that action, and the Court of Appeals vacated that judgment. On September 13, 2005, on remand from this Court, the Court of Appeals adhered to its prior decision "because the district court prematurely dismissed the action before an adverse party was joined." *See App. 5a n.4.*

TABLE OF CONTENTS

	<i>Page</i>
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
CORPORATE DISCLOSURE STATEMENT	iii
TABLE OF CONTENTS	iv
TABLE OF CITED AUTHORITIES	vii
TABLE OF APPENDICES	xii
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATEMENT OF THE CASE	1
The Complaint of the EC and Ten Member States	2
The Complaint of the Departments of the Republic of Colombia	3
Petitioners' Common Law Claims for Injunctive and Other Equitable Relief	4
Proceedings in the District Court	6
Proceedings in the Court of Appeals	8

Contents

	<i>Page</i>
Petition for a Writ of Certiorari (No. 03-1427)	9
<i>Pasquantino v. United States</i>	10
This Court Vacated the Second Circuit's Judgment: "GVR" Order	10
Proceedings in the Court of Appeals on Remand	11
REASONS FOR GRANTING THE PETITION ...	11
I. THE SECOND CIRCUIT FAILED TO COMPLY WITH THIS COURT'S MANDATE AND <i>PASQUANTINO</i>	13
A. <i>Pasquantino</i> Superseded the Second Circuit's Reasoning and Result	15
1. This Court Supplanted the Second Circuit's Definition of the Revenue Rule	15
2. This Court Supplanted the Second Circuit's Reasoning	18
3. The Second Circuit's "Version" of the Revenue Rule Conflicts With the Decisions of the Fourth and Ninth Circuits and Other Authorities	20

Contents

	<i>Page</i>
B. The Second Circuit Applied an Incorrect Legal Standard	21
C. The Second Circuit Misapprehended the Claims as Pled	22
II. THE SECOND CIRCUIT'S DECISION – THAT THE REVENUE RULE IS A KIN TO A JURISDICTIONAL BAR AND IS NOT A DISCRETIONARY ABSTENTION DOCTRINE – CONFLICTS WITH THE DECISIONS OF THIS COURT, THE FOURTH AND ELEVENTH CIRCUITS, THE HOUSE OF LORDS, AND THE RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW	25
CONCLUSION	29

TABLE OF CITED AUTHORITIES

	<i>Page</i>
Cases	
<i>Arnold Tours, Inc. v. Camp</i> , 400 U.S. 45 (1970)	14
<i>Attorney General of Canada v. R.J. Reynolds Tobacco Co.</i> , 268 F.3d 103 (2d Cir. 2001), <i>cert. denied</i> , 537 U.S. 1000 (2002) <i>passim</i>	
<i>Conley v. Gibson</i> , 355 U.S. 41 (1957)	23
<i>County of Allegheny v. ACLU</i> , 492 U.S. 573 (1989)	17
<i>Dye v. Hofbauer</i> , 126 S. Ct. 5 (2005)	24
<i>Ecuador v. Philip Morris Cos.</i> , 188 F. Supp. 2d 1359 (S.D. Fla. 2002), <i>aff'd sub nom. Republic of Honduras v. Philip Morris Cos.</i> , 341 F.3d 1253 (11th Cir. 2003), <i>cert. denied</i> , 540 U.S. 1109 (2004)	26
<i>European Community v. RJR Nabisco, Inc.</i> , 125 S. Ct. 1968 (2005) i, 10	
<i>Exxon Mobil Corp. v. Allapattah Services, Inc.</i> , 125 S. Ct. 2611 (2005)	24
<i>Gulf Refining Co. v. United States</i> , 269 U.S. 125 (1925)	13

Cited Authorities

	<i>Page</i>
<i>Her Majesty the Queen in Right of the Province of British Columbia v. Gilbertson</i> , 597 F.2d 1161 (9th Cir. 1979)	20
<i>Hohn v. United States</i> , 524 U.S. 236 (1998)	14
<i>Hullet v. King of Spain</i> , I Dow & Clark 488 (H.L.) (1828)	28
<i>Hutto v. Davis</i> , 454 U.S. 370 (1982)	14
<i>INS v. Miranda</i> , 459 U.S. 14 (1982)	14
<i>King of Two Sicilies v. Willcox</i> , 1 Sim. (N.S.) 301 (1851)	28
<i>Kingdom of Spain v. Christie Ltd.</i> , [1986] 1 W.L.R. 1120 (Eng. Ch. D.)	27
<i>Lawrence v. Chater</i> , 516 U.S. 163 (1996)	11
<i>Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC</i> , 478 U.S. 421 (1986)	17
<i>Massachusetts v. Missouri</i> , 308 U.S. 1 (1939)	26
<i>Meredith v. Winter Haven</i> , 320 U.S. 228 (1943) ...	28
<i>Milwaukee County v. M. E. White Co.</i> , 296 U.S. 268 (1935)	16, 22, 26

Cited Authorities

	<i>Page</i>
<i>Pasquantino v. United States</i> , 125 S. Ct. 1766 (2005)	<i>passim</i>
<i>Perkins v. Fourniquet</i> , 55 U.S. 328 (1852)	14
<i>Peter Buchanan L. D. v. McVey</i> , [1955] A. C. 530 (Ir. Sup. Ct. 1951)	20
<i>Powell v. Texas</i> , 492 U.S. 680 (1989)	13
<i>Republic of Haiti v. Duvalier</i> , [1990] QB 202 (Eng. C. A.)	27
<i>Republic of the Philippines v. Marcos</i> , 862 F.2d 1355 (9th Cir. 1988) (<i>en banc</i>)	27
<i>Rhodes v. Stewart</i> , 488 U.S. 1 (1988)	13
<i>Rogers v. Hill</i> , 289 U.S. 582 (1933)	13
<i>Seminole Tribe v. Florida</i> , 517 U.S. 44 (1996)	17
<i>Square D. Co. v. Niagara Frontier Tariff Bureau, Inc.</i> , 760 F.2d 1347 (2d Cir.), <i>aff'd</i> , 476 U.S. 409 (1986)	24-25
<i>State of Norway (Nos. 1 and 2)</i> , [1990] A.C. 723 (H.L.)	20, 26
<i>Sumner v. Mata</i> , 455 U.S. 591 (1982)	14, 17

Cited Authorities

	<i>Page</i>
<i>United States of America v. Levy</i> , [1999] CarswellOnt 926 (Ont. Gen. Div.)	27
<i>United States v. E.I. Du Pont de Nemours & Co.</i> , 366 U.S. 316 (1961)	13
<i>United States v. Fossatt</i> , 62 U.S. 445 (1858)	14
<i>United States v. Harden</i> , [1963] S.C.R. 366 (Can.)	20
<i>United States v. Pasquantino</i> , 336 F.3d 321 (4th Cir. 2003) (<i>en banc</i>), aff'd, 125 S. Ct. 1766 (2005) ...	20, 26
<i>United States of America v. Prioleau</i> , 2 H. & M. 559 (1865)	27

<i>United States of America v. Wagner</i> , [1866-67] L.R. 2 Ch. App. 582, 1856 WL 8317 (CA in Chancery)	27
--	----

Statutes

28 U.S.C. § 1254(1)	1, 14
28 U.S.C. § 1651	1, 14

Federal Rules of Civil Procedure

Fed. R. Civ. P. 12(b)(6)	6, 8, 23
--------------------------------	----------

Cited Authorities

	<i>Page</i>
Other Authorities	
Restatement (Third) of Foreign Relations Law § 483 (1987)	<i>passim</i>
Statement of Stuart E. Schiffer, Acting Assistant Attorney General, Civil Division, U.S. Department of Justice, Hearing Before the U.S. Senate Special Committee on Aging, Medicare Enforcement Actions: The Federal Government's Anti-Fraud Efforts, Serial No. 107-11 (July 26, 2001)	27